MOHD AFSAR YUNUS

v.

HANDAL UTAMA SDN. BHD.

HIGH COURT SABAH AND SARAWAK, KOTA KINABALU
TUAN TEE AH SING JC
[CIVIL APPEAL NO. K12-03-1994]
9 DECEMBER 1994

BANKRUPTCY: *Undischarged bankrupt suing for breach of contract - Whether maintainable - Sanction of Official Assignee - Whether a prerequisite - Bankruptcy Act 1967 s. 38(1)(a) - Whether action came within exception thereof.*

PRACTICE & PROCEDURE: *Subordinate Courts Rules 1980 O. 28 r. 8(1) - Application to set aside default judgment - Application filed out of time - Sessions Judge enlarged time without application being made under O. 3 r. 5 - Whether proper.*

WORDS & PHRASES: *"Injury to his person" - Section 38 (1) (a) Bankruptcy Act 1967.*

The appellant was an undischarged bankrupt. While being in that state the appellant entered into a contract of employment with the respodent. Later, the appellant sued the respondent for breach of contract and claimed arrears of salary. No sanction of the Official Assignee was obtained in instituting this action.

On 7 September 1993 the appellant obtained a default judgment against the respondent. The respondent then filed a notice of application to set aside the judgment, but did so two days outside the 30 day period prescribed by O. 29 r. 4 of the Subordinate Courts Rules 1980 (SCR). However, notwithstanding that the respodent had not applied for enlargement of time, the Sessions Judge, on her own accord, extended the time and allowed the respondent's application to set aside. Having heard the application, she ruled that the appellant's suit was unmaintainable being in contravention of s. 38 of the Bankruptcy Act 1967. The appellant hence appealed.

Before the learned Judicial Commissioner the main issue that arose was whether bearing in mind s. 38 of the Bankruptcy Act 1967 the appellant was competent to maintain the action against the respondent.

Held:

[1]The finding of the Sessions Judge that the words "Injury to his person" in s. 38(1)(a) of the Bankruptcy Act 1967 meant only and must be limited to physical injury to the body is flawed as that was too narrow and limited an interpretation. The words must be read to include any injury which the bankrupt suffers in mind or body, which might give rise to an action for damages, or which cause of, or chose in action, or right to sue remained in the bankrupt after the bankruptcy.

[2] The aforesaid notwithstanding, the claim for arrears of salary in the instant case does not come within the ambit of the words "injury to his person" in s. 38(1) (a) of the Bankruptcy Act 1967. To suggest that an action for breach of contract of employment is injury to the person or injury to reputation is absurd. As such the appellant must obtain the sanction of the Official Assignee before he can bring this action against the respondent.

[3] Since the appellant, being an undischarged bankrupt, has not obtained the Official Assignee's sanction before proceeding with the action, he has no *locus standi* to file the

writ of summons in question. Therefore the Sessions Judge was correct when she set aside the judgment in default on the main ground that the appellant did not have the sanction of the Official Assignee to pursue this action.

[4] The Sessions Judge was however in error when she on her own volition extended the time to allow the application to be made without any application under O. 3 r. 5 of the Subordinate Courts Rules 1980. The notice of application ought to have been dismissed, there being no application under O. 3 for enlargement of time.

[Appeal dismissed].

Cases referred to:
K. Ismail Ganey Rowther and Company v. M.A. Abdul Kadir [1933] (Vol. II) MLJ 98 ***(refd)***
Sharifah Aini binte Syed Jaafar v. Karangkraf Sdn. Bhd. [1989] 2 CLJ 1269 ***(dist)***
Gan Hong Hoe v. Gan Kim Hee [1939] 8 MLJ 295 ***(dist)***
P.T. Pelajaran Nasional Indonesia v. Joo Seang & Co. Ltd. [1958] MLJ 113 ***(refd)***
Latchman Singh & Sons v. Tan Kian [1991] 1 CLJ 128 ***(foll)***
Fira Development Sdn. Bhd. v. Goldwin Sdn. Bhd. [1989] 1 MLJ 40 at 41 ***(dist)***

Legislation referred to:
Bankruptcy Act 1967, ss. 33(1)(a), 38, 38(1), 38(1)(a)
Subordinate Courts Rules 1980, O. 7 r. 10, O. 25 rr. 26(1) & (2), O. 28 rr. (2), 8, 8(1),O. 29 r. 14, O. 32 rr. 1(1),(3)
The Companies Act 1965, ss. 6(b),(d) & (e), 141, 141(8), 141(6)(b) & (d)

For the appellant - Sugumar Balakrishnan
For the respondent - Raymond Wong

JUDGMENT

Tee Ah Sing JC:

In this appeal the respondents had filed notice of application for the following order:

1) the Judgment dated 7 December 1993 entered against the respondents be set aside pursuant to O. 28 r. 8(1) of the Subordinate Courts Rules 1980 and that the respondents be at liberty to file a statement of defence within fourteen (14) days from the date of the order thereof.

2) the writ of seizure and sale dated 29 December 1992 be stayed forthwith persuant to O. 32 r. 1(1).

This application was supported by the affidavit of Lim Ee Lock affirmed on 7 January 1994, a supplementary affidavit of Lim Ee Lock affirmed on 11 April 1994, and affidavit-in-reply of Chu Tung Guan @ Chow Tung Yeen affirmed on 24 January 1994.

The appellant filed an affidavit-in-oposition by Mohd. Afsar Yunus affirmed on 19 January 1994, suplementary affidavit of Zunaidi bin Matsuali affirmed on 19 January 1994, and further affidavit of Charles Michael Decena @ Charles affirmed on 19 January 1994 to oppose the application.

The grounds of appeal as stated in the memorandum of appeal are as follows:

1.1 The learned sessions Court Judge erred in law when she held that the respondents' filing of their application in contravention of O. 28 r. 8 read together with O. 29 r. 14 of the Subordinate Courts Rules, 1980 did not amount to an irregularity.

1.2 The learned sessions Court Judge erred in law when she on her own volition extended the time for filing the respondents' application despite the fact that the respondents did not make any application, formal or otherwise, to extend the time for making the said application.

1.3 The learned sessions Court Judge erred in law in extending the time for making the respondents' application when she had jurisdiction under any written law or under the Rules to do so in the absence of any application for extension of time before the Court by the respondents.

2. The learned sessions Court Judge erred in law and in fact when she failed or refused to adjudicate upon the appellant's following preliminary objections:

(a) that the respondents' affidavits are inadmissible by reasons of the deponent's failure to comply with O. 25 r. 26(1) and (2) of the Subordinate Courts Rules, 1980:

(b) that the respondents' application under O. 32 r. 1(1) of the Subordinate Courts Rules, 1980 had failed to comply with the provisions of the aforesaid O. 32 r. 1(3).

3.1 The learned sessions Court Judge erred in law and in fact when she held that the appellant could not maintain his action by virtue of s. 38 of the Bankruptcy Act, 1967.

3.2 The learned sessions Court Judge erred in law and in fact when she failed to take into consideration the official assignee's letter dated 18 January 1994 which categorically stated that the appellant was entitled to proceed with the action without the previous sanction of the official assignee.

3.3 The learned sessions Court Judge erred in law and in fact in holding that the appellant did not come within the exception provided under s. 38(1)(a) of the Bankruptcy Act, 1967.

4. The learned sessions Court Judge erred in law and in fact in allowing the respondents' application.

5. The learned sessions Court Judge erred in law and in fact in arriving at her decision and has disregarded and failed to consider the import and purpose of the various authorities cited to her and in the circumstances, the learned sessions Court Judge's decision dated 8 February 1994 is wrong in law and in fact and contrary to authority and should therefore be set aside.

I shall deal with the main grounds of appeal first, i.e., grounds 3 in the petition of appeal. The respondents has raised the issue that the appellant was an undischarged bankrupt. By virtue of s. 38(1)(a) of the Bankruptcy Act 1967 the appellant was incompetent to maintain the action without the previous sanction of the official assignee.

On the other hand learned Counsel for the appellant submitted that the cause of action comes within the exception provided by s. 38(1)(a) of the Bankruptcy Act 1967 and as such do not require the sanction of the official assignee.

Section 38(1) of the Bankruptcy Act 1967 reads as follows:

38. (1) where a bankrupt has not obtained his discharge:

(a) the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the official assignee."

Learned Counsel for the appellant cited the following cases:

K. Ismail Ganey Rowther and Company v. M.A. Abdul Kadir [1933] (Vol. II) MLJ 98 Thorne, Acting, CJ at p. 99 said:

Now, the difficulty which arises is brought about by the language of s. 33(i)(a) of the Bankruptcy Enactment. That section reads:

(i) where a bankrupt has not obtained his discharge the following consequences shall ensue:

(a) The bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the official assignee;

The learned Judge below, as I understand him, held that the words "Injury to person" meant only and must be limited to physical injury to the body. In my humble opinion that is too limited an interpretation of these words. I read these words 'injury to his person' to be any injury which the bankrupt suffers in mind or body, which might give rise to an action for damages, and which cause of, or chose in action, or right to sue remained in the bankrupt after the bankruptcy.

I understand the appellant to argue here that the learned Judge's interpretation of the section is correct but I am unable to agree with that view.

Later on in the same page Thorne, Acting CJ said:

In my view, and it is my view only what the section means is this:

With regard to any property which is left in the bankrupt after his bankruptcy the bankrupt is incompetent to sue unless he first obtains the sanction of the official assignee. Instances of this are:

(a) the tools of his trade and the necessary wearing apparel and bedding of the bankrupt. His wife, and family;

(b) after-acquired property until such time as the official assignee intervenes;

(c) a contract made by the bankrupt after the bankruptcy;

(d) damages for breach after bankruptcy of a contract for personal service made before and remaining unexecuted at the date of the bankruptcy; and

(e) property vested in the bankrupt but of which he is a trustee. This is not exhaustive, but in these instances the bankrupt is incompetent to sue unless he first of all goes to the Official Assignee to say that he has no objection to the bankrupt bringing the action.

Learned Counsel for the appellant submitted that in our instant case the contract of employment was made after the bankruptcy, the illustration by Thorne Acting CJ in the case of *K. Ismail Ganey Rowther v. M.A. Abdul Kadir* [1933] 2 MLJ 98 does not apply and therefore does not require the sanction of the official assignee.

I disagree with this contention because His Lordship Thorne Acting CJ also said "This is not exhaustive, but in these instances the bankrupt is incompetent to sue...." The examples given by His Lordship are not exhaustive and he did not express the view that a contract of employment made after bankruptcy does not require the sanction of the official assignee.

A *fortiori* the contract of employment is a contract and as such falls under illustration (c) given by His Lordship Thorne Acting CJ of a contract made by the bankrupt after the bankruptcy which require the sanction of the official assignee.

In the instant case I am of the view that the claim for arrears of salary does not come within the ambit of the words "injury to the person" in s. 38(1)(a) of the Bankruptcy Act 1967. As such the appellant must obtain the sanction of the official assignee before he can bring this action against the respondent for breach of the contract of employment.

Learned Counsel for the appellant submitted that the non-payment of the appellant's arrears of salary and salary in lieu of notice affects the appellant in his mind and body as he is deprived of his basic livelihood. From the pleadings there is no claim for any damages for physical injuries, libel, slander or injury to the character of the appellant. The claim if for breach of contract of employment. As such I reject this contention.

The learned Counsel for the appellant next cited the case of *Sharifah Aini binte Syed Jaafar v. Karangkraf Sdn. Bhd.* [1989] 2 CLJ 1269 a decision of his Lordship Ajaib Singh J where at p. 1270 he said:

> Rights of action relating to a bankrupt's property pass to the official assignee but any right of action arising from injury to a bankrupt's person or reputation does not pass to the official assignee but remains with the bankrupt. In this case the plaintiff's suit against the defendants is of a personal nature and does not touch upon her property. Her action against the defendants is for damages for injury to her reputation.

Learned Counsel for the appellant submitted that the appellant's claim is also of a personal nature since he is claiming arrears of salary. In the case of *Sharifah Aini* the plaintiff sued the defendants for defamation. Therefore when His Lordship Ajaib Singh J used the words "is of a personal nature" it is clear he is referring to the defamation. The Learned Sessions Court Judge was correct when she stated "*Sharifah Aini's* case concerns libel and can be distinguished as it would come within "injury to the mind."

In our instant case to suggest that an action for breach of contract of employment is injury to the person or injury to reputation is absurd.

In *Gan Hong Hoe v. Gan Kim Hee* [1939] 8 MLJ 295, the Headnote reads: "There is nothing in the Bankruptcy Enactment (Cap. 55) which would preclude a creditor from maintaining an action on a contract entered into by him with the debtor after the debtor has been a judged bankrupt.

This case decided that a creditor can maintain a suit against a debtor on a contract entered into by the creditor with the debtor after the debtor has been adjudged bankrupt.

This case did not decide that a bankrupt can sue for breach of contract. Section 33(i)(a) of the Bankruptcy Enactment was also not referred in the said judgment.

The case of *K. Ismail Ganey Rowther and Company v. M.A. Abdul Kadir* [1933] 2 MLJ 98 was also not referred to in *Gan's* case.

I find that the case of *Gan Hong Hoe v. Gan Kim hee* [1939] 8 MLJ 295 is not an authority that in respect of contract of employment made after bankruptcy no sanction of the official Assignee is required.

In our instant case there is no claim in respect of any injury to person. Neither is there any claim for libel or slander. The present case does not fall within any of the exceptions within the ambit of s. 38(1)(a) of the Bankruptcy Act 1967.

Since the appellant is an undischarged bankrupt he is therefore not competent to file the writ of summons without the previous sanction of the official assignee.

As a bankrupt the appellant has no *locus standi* to file the summons. Therefore the learned sessions Court Judge was correct when she set aside the judgment in default on the main ground that the appellant did not have the sanction of the official assignee to pursue this action.

If I am wrong on the main ground of appeal I shall now deal with the other grounds of appeal.

Next I shall deal with the second ground of appeal.

The learned Counsel for the appellant had raised two preliminary issues as indicated in the memorandum of appeal. Both the preliminary objections were never adjudicated upon by the learned sessions Court Judge.

I agree with learned Counsel for the appellant that the learned sessions Court Judge should have adjudicated on the preliminary objections before proceeding to hear the application proper.

Lastly I shall now deal with the first ground of appeal as stated in the memorandum of appeal.

Learned Counsel for the respondent submitted that the summons which was served on Charles Decena was bad because the said Charles Decena has no capacity to accept service as he is not the director nor the company's secretary for the respondents.

Learned Counsel for the respondent urged upon the Court that the service of the summons on the respondent was bad and in support of this argument he referred to the case of *P.T. Pelajaran Nasional Indonesia v. Joo Seang & Co. Ltd.* [1958] MLJ 113.

Learned Counsel for the appellant on the other hand argued that it was a good service because it was done in accordance with the provisions of O. 7 r. 10 of the Subordinate Courts Rules 1980.

The first issue is whether the said Charles Decena a director and company secretary of the respondents on 8 November 1993 and 9 December 1993 when he acknowledged receipt of the summons and the judgment.

Section 141(6) of the Companies Act 1965 provides as follows:

> (6) The company shall lodge with the registrar:
>
> (a) ...
>
> (b) within one month after a person ceases to be, or becomes, a director of the company a return in the prescribed form notifying the registrar of the change and containing, with respect to each then director of the company, the particulars required to be specified in the register;
>
> (c) ...
>
> (d) within one month after a person ceases to be a manager or secretary of the company, a return in the prescribed form notifying the registrar of that fact;
>
> (e) within one month of any change in the name residential address and other prescribed particulars of any director, manager or secretary a notice in the prescribed form notifying the registrar of the new name, residential address and other prescribed particulars of that person.

Thus the respondent under s. 141, 6(b), (d) and (e) of the Companies Act 1965 is required to notify the Registrar of Companies of the change of any directors or company secretary.

In the affidavit-in-support of Lim Ee Lock in para. 5(c) it is averred that Charles Decena who purported to accept service of the summons is not authorised to accept service of document of any nature let alone a summons as he is only hired to work as a site overseers.

a A copy of Form 49 of the Companies Act 1965 is exhibited as "LEL-1".

I have perused Exhibit "LEL-1". It is not certified by the Registrar of Companies.

By virtue of s. 141(8) of the Companies Act 1965 Exhibit "LEL-1" cannot be accepted as there is no certificate of the Registrar.

b In para. 3 of the affidavit-in-reply of Chu Tung Guan @ Chow Tung Yeen it is averred that one Charles Decena was not a company secretary nor director of the respondents with effect from 31 August 1993.

A copy of the certified true copy by the assistant registrar of company dated 20 January 1994 of the respondents' Form 49 is produced and marked as Exhibit "CTG-1".

c In the affidavit in opposition of Mohd. Afsar Yunus, in para. 4 it is averred that he had been informed by Encik Zunaidi bin Matsuali that he had duly served the summons on the respondents by personal service on 8 November 1993 and that service was duly acknowledge by Mr. Charles Decena on behalf of the respondents by signing and affixing a rubber stamp of the respondents on the proof of service copy thereof.

d In para. 6 it is averred that he was further informed by Encik Zunaidi bin Matsuali that he had served the summons upon the respondents at the respondents' registered address at Lot 6AF-04, 6th Floor, Block A, Kompleks Karamunsing, 88300 Kota Kinabalu.

Certified true copies of Form 44 and form 49 were exhibited as Exhibits "May-2" and "May-3".

e In para. 8 it is averred that he was informed by Encik Zunaidi bin Matsuali that he had on 9 December 1993 served by personal service a seal copy of the judgment entered against the respondents on 7 December 1993 upon the respondents and that the said Mr. Charles Decena had duly accepted service of the Judgment by signing and affixing a rubber stamp of the respondents on Messrs Sugumar & Co's letter dated 9 December 1993 (Exhibit "MAY-4").

f From Form 44 (Exhibit "MAY-2") it is clear that the registered office of the respondents is at Lot 6AF04, 6th Floor, Block A, Kompleks Karamunsing, 88300 Kota Kinabalu.

I refer to the affidavit-in-support of Susan Liew Su Shan and Koa Mei Mei (p. 42 of the appeal record) where in para. 1 it is averred that they are employed for the post of secretary/ administrative clerk for Antara Roda Sdn. Bhd. whose registered address is at Lot 6AF04 6th Floor Kompleks Karamunsing Kota Kinabalu and that they have sole access to the premises. And in para. 4 it is averred that at all material time as alleged when the summons was purportedly served to Handal Utama Sdn. Bhd. there was no person by the name of Zunaidi bin Matsuali attempting service of any documents or otherwise to the defendants nor any Charles Decena present at our office."

g

h In view of Exhibit "MAY-2" which confirms that the registered office of the respondents is at Lot 6AF04 6th Floor, Block A, Kompleks Karamunsing, Kota Kinabalu, I cannot accept the aforesaid averments.

From Form 49 (Exhibit "MAY-3") certified by the Penolong Pendaftar Syarikat Sabah on 10 December 1993, it is stated that Michael Decena @ Charles is a director and a secretary of the respondents.

i The issue therefore is whether or not the service of the summons has been carried out effectively.

I have perused Exhibit "CTG-1" (pp. 54 and 55 of the Appeal Record).

The name of Charles Decena is not mentioned at all. If as averred in para. 2 of the affidavit-in-reply of Chu Tung Guan @ Chow Tung Yeen that one Charles Decena was not a company secretary nor director of the defendants with effect from 31 August 1993 why was this fact not stated in Form 49. In the said Form 49 under Heading "Directors" in the column "Full Name" the third name "Sery (f) and under the column "Nature of Appointment or Change & Relevant Date" is stated "Resigned WEF 31 August 1993" in respect of Sery. And in the form for managers and secretaries, under secretaries the name 'Hii Joon Teck' and under the column "Nature of Appointment, or change and relevant date" it is stated "Resigned WEF 31 August 1993" in respect of Hii Joon Teck.

If Charles Decena had ceased to be a director and company secretary on 31 August 1993 why was not these facts stated in Exhibit "CTG-1"? Section 141(6)(b) and (d) clearly stipulates that the respondent must submit the return in the prescribed form that Charles Decena has ceased to be a director and company secretary within one month after he ceased to be such. In the absence of such return the avernment that Charles Decena was not a director and secretary of the respondent with effect from 31 August 1993 is unsustainable.

From Exhibit "MAY-3" i.e., form 49, certified true copy dated 10 December 1993 by the assistant registrar of companies confirmed that on 10 December 1993 Michael Decena @ Charles was a director and secretary of the respondents.

Section 141(8) of the Companies Act 1965 provides as follows:

> (8) A certificate of the registrar stating that from any return lodged with the Registrar pursuant to this section it appears that at any time specified in the certificate any person was a director manager of secretary of a specified company shall in all Courts and by all persons having power to take evidence for the purposes of this act, be received as *prima facie* evidence of the facts stated therein and for the purposes of this subsection a person who appears from any return so lodged to be a director manager of secretary of a company shall be deemed to continue as such until by a subsequent return so lodged or by a notification of change in the prescribed form so lodged it appears that he has ceased to be such a director manager or secretary.

By virtue of this provision I am of the view that Charles Decena was a director and secretary of the respondents on 8 November 1993 when the summons was served on him and also on 9 December 1993 when the judgment was served on him. Further by virtue of the said provision (s. 141(8) of the Companies Act 1965) from Exhibit "CTG-1" it would appear that on 20 January 1994 i.e., the date of certification by the assistant registrar of companies that since the name of Charles Decena is not stated it would appear that Charles Decena was not a director nor secretary of the respondents as from 20 January 1994 and not before this date.

In view of the foregoing I am of the view that the service of the summons and the judgment has been properly served on the respondents.

Since I have found that the service of the summons and the judgment were proper the next question is whether the notice of application was filed within the time prescribed under O. 29 r. 14 of the Subordinate Courts Rules 1980.

Order 28 of the Subordinate Courts Rules 1980 provides as follows:

> 8(1) Any judgment or order obtained where one party does not appear at the hearing may be set aside by the Court, on the application of that party on such terms as it thinks just.
>
> (2) An application under this rule must be subject to O. 29, r. 14.

Order 29 r. 14 reads as follows:

> 14. where in these rules provisions are made for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment must make his application to the Court and serve it on the party who has obtained the judgment within 30 days after the receipt of the order or judgment.

Order 28 r. (2) and O. 29 r. 14 were added by virtue of P.U (A) 193/93 which came into force on 1 August 1993.

Order 28(2) of the Subordinate Courts Rules 1980 before being amended by P.U. (A) 193/93 read as follows:

> (2) An application under this rule must be made within 14 days after the hearing.

And the aforesaid provision had been considered and decided in the case of *Latchman Singh & Sons v. Tan Kian* [1991] 1 CLJ 128 where His Lordship Datuk Wira Wan Yahya bin Pawan Teh J (as he then was) at pp. 130 and 131 said:

> Non compliance with O. 28 r. 8(2) entails an application for an extension of time. Such application comes under O. 3 r. 5 of the Subordinate Courts Rules. Different considerations apply to an application to extend time and one to set aside judgment.

Further down the same page His Lordship stated:

> The mainstay of the appellant's argument is based on a passage in the Supreme Court judgment of *Fira Development Sdn. Bhd. v. Goldwin Sdn. Bhd.* [1989] 1 MLJ 40 at 41 in which Lee Hun Hoe, CJ (Borneo) said: we are unable to agree with the reasoning of the learned Judge. First, where an application is made for setting aside a judgment in default the learned Judge would have to consider the merits of the case.

That case is however distinguishable from our present case. *Fira Development's* case refers to an application to set aside judgment under O. 13 r. 8 of the Rules of High Court. ....However in this present appeal we are dealing with an application under O. 28 r. 8(1) and (2) of the Subordinate Courts Rules which is differently worded.

...Order 28 r. 8(2) of the Subordinate Court Rules imposed an imperative time limit within which the application must be made.

...

But in an application under the Subordinate Court Rules the applicant must primarily satisfy the Court that he has good reasons for not acting within the prescribed time before proceeding to establish the other two requirements.

Learned Counsel for the respondents contended that the judgement in default was an irregular judgment. As such the respondent is entitled *ex debito justitiae* to have it set aside. So it was submitted the extension of time given by the learned sessions Court Judge is superflous.

From the evidence adduced I find that the judgement in default was a regular judgment. Therefore I reject this contention.

Learned Counsel for the respondent submitted that notwithstanding O. 29 r. 14 an application to set aside judgement in default shall be made promptly and within reasonable time. I also reject this contention because the period described is imperative. The application must be filed within 30 days. In support I cite the case of *Latchman Singh & Sons v. Tan Kian* [1991] 1 CLJ 128.

The learned sessions Court Judge in her ruling stated "An application for setting aside of judgment in default has to be made within 30 days under the recent amendments. In his case plaintiffs have submitted that the application is outside the 30 days period. I would dismissed this argument as Court have consistently held the mere delay in filing the application to set aside is not the sole consideration. In this case the delay is only 2 days and I would extend time to allow the application to be made."

I am of the view that the learned sessions Court Judge was in error when she on her own volition extended the time to allow the application to be made without any application under O. 3 r. 5 of the Subordinate Courts Rules 1980.

On the question of enlargement of time under O. 3 r. 5 I am of the view that the respondents should file an application for the Sessions Court Judge to decide whether to grant or not to grant extension of time.

As there was no such application to extend time, I am of the view that the learned sessions Court Judge shall have dismissed the said notice of application.

In conclusion as the appellant is an undischarged bankrupt and he has not obtained the previous sanction of the official assignee he is incompetent to bring this action against the respondents. On this ground the appeal is dismissed with costs.